Chee Tat's appeal, however, where the notice of appeal had been served on respondents one month and seven days after the last day prescribed for it to be filed in court, his Lordship did not expressly say whether he considered service to have been effected within a reasonable time, but upholding the objection by counsel for the respondents that no notice of appeal having been served on or before the last date for it being filed in court (there being no application by appellants for enlargement of time for such service), dismissed the appeal.

In short, Sharma J. decided that service of the notice of appeal on respondents under O. XXXIX r. 2(6) of the Subordinate Courts Rules should also be effected within 14 days from the day on which decision was pronounced.

With the deepest respect, I would say that the Rules Committee would have prescribed a time for service on all parties affected by the appeal as it had done for filing the notice of appeal in r. 2(3) and for making various payments into court in r. 2(5) had that been the intention and that it would be incorrect to assume that the absence of time for service should be regarded as a defect in the Rules or an error by the Rules Committee.

This seems to be an appropriate instance when section 54(2) of the Interpretation Act, 1967 should be applied. That sub-section reads: —

"Where no time is prescribed within which anything shall be done, that thing shall be done with all convenient speed and as often as the prescribed occasion arises."

Service some 25 days after the last day for filing such notice of appeal in court, I consider to be speedy enough in the circumstances. The need for extension of time for such service does not therefore arise.

There shall therefore be no order on the motion.

No order.

Solicitors: *J. Nadchatiram & Co.; Seah Choon Chye.*

RE KHOO KIM HOCK

[O.Bk.J. (Mohamed Azmi J.) April 22, 1974]
[Kuala Lumpur — In Bankruptcy No. 157 of 1973]

Bankruptcy — Adjudication order — Application by undischarged bankrupt for an order to annul — Whether bankrupt has a right to engage a solicitor — 'Property' and 'Chose in action' — Bankruptcy Act, 1967, ss. 38(1)(a), 92(1), 105(1).

This was an application by an undischarged bankrupt for an order annulling the adjudication order under sections 92(1) and 105(1) of the Bankruptcy Act 1967 for reasons that he ought not to have been adjudged a bankrupt as he was not indebted to anyone and that his own petition was filed under a misconception of law and liability towards his alleged creditor. When the application came up for hearing, counsel for the Official Assignee raised a preliminary objection on a point of law contending that having regard to the provisions of the Bankruptcy Act an undischarged bankrupt in this country was disabled not only from maintaining the present application but also from employing an advocate and solicitor unless the prior sanction of the Official Assignee was first obtained. Section 38(1)(a) of the Bankruptcy Act provides:

"Where a bankrupt has not obtained his discharge — the bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the Official Assignee."

Held: (1) section 38(1)(a) does not apply to an application under sections 92(1) and 105(1) of the Bankruptcy Act, where a bankrupt is seeking the court's discretion to review, rescind or vary any order made by it, and as such no previous sanction of the Official Assignee is necessary in the present case;

(2) an undischarged bankrupt in this country is entitled to engage an advocate and solicitor to represent him in any action where the provision of section 38(1)(a) does not apply, or where the cause of action does not vest in the Official Assignee.

Cases referred to:-

(1) *K. Ismail Ganey Rowther & Co.* v. *M.A. Abdul Kader* [1933] M.L.J. 98.

(2) *Re Ex parte Reynolds* (1885) 15 Q.B.D. 169.

(3) *Re Elderton Ex parte Russel* (1887) 4 Mon. 36 C.A.

IN BANKRUPTCY.

V. K. Palasuntharam with *V. Manuel* for the applicant.

V. C. George with *David Dass* for the creditor/respondent.

Vincent Das (Senior Assistant Official Assignee) for Official Assignee.

Mohamed Azmi J.: This is an application by Notice of Motion dated November 29, 1973 by an undischarged bankrupt for an order annulling the adjudication order dated May 7, 1973 under sections 92(1) and 105(1) of the Bankruptcy Act, 1967 for reasons that the applicant ought not to have been adjudged a bankrupt as he is not indebted to anyone and that his own petition was filed under a misconception of law and liability towards his alleged creditor, namely, J. Ballas & Co. Pte. Singapore, by reason of duress and mental instability, and for other reliefs. The applicant's own petition came up before Yong J. wherein the applicant declared that he was unable to pay his debts and accordingly receiving and adjudication orders were made against him. From the Official Assignee's Report dated January 1, 1974 the bankrupt filed his state of affairs on May 7, 1973, *i.e.* the very day he was adjudged bankrupt, disclosing a liability of $39,092.50 due to J. Ballas & Company — an unsecured creditor. No assets were disclosed. But the unsecured creditor filed a claim to the extent of $1,263,759.59 against the bankrupt's estate on account of purchase of shares and share transactions with the bankrupt and supported its claim with a statement of account. Summary administration order was made on July 7, 1973. The first creditors Meeting was held on July 19 the same year. Public examination under section 17 was fixed on August 24, 1973 and adjourned to April 10, 1974 for further hearing.

When this application came up for hearing, Mr. Das for the Official Assignee raised a preliminary objection on point of law. Both in his written and oral submissions it is his contention that having regard to the provisions in the Bankruptcy Act 1967, an undischarged bankrupt in this country is disabled not only from maintaining the present application but also from employing an advocate and solicitor unless the prior sanction of the Official Assignee is first obtained. Since

no such sanction has been obtained, it is argued that the present application is misconceived and ought to be struck out. In support of his argument, Mr. Das relies on the provisions of sections 8(1), 24(4), 30, 38(1)(a), 55(1) and (2), 58 and 61(b) and (c) of the Bankruptcy Act, and he also relies on the judgment of Thorne Ag. C.J. in *K. Ismail Ganey Rowther & Co.* v. *M. A. Abdul Kader*.[1]

On the question of incompetency of an undischarged bankrupt to maintain court action, section 38(1)(a) provides:

"Where a bankrupt has not obtained his discharge — the bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the Official Assignee."

The first question for determination is whether the requirement of sanction of the Official Assignee under section 38(1)(a) applies only to a bankrupt's ordinary claims, *i.e.* maintaining court action involving third parties, or does it extend to all actions including proceedings, as in the present case, where the bankrupt is challenging the very validity of the adjudication order by which he has been adjudged bankrupt. Having considered the provisions of the Bankruptcy Act as a whole and the section itself, it is my considered opinion that the sanction requirement does not apply to cases where the bankrupt is seeking to challenge an order in bankruptcy, or where he is applying to be discharged or where he is seeking the court's discretion to review, rescind or vary any order made by it under its bankruptcy jurisdiction. The exception contained within brackets in section 38(1)(a) clearly indicates that the section is intended to apply only to actions for recovery of something — either real or personal — which can be turned into assets such as a claim for recovery of property or money due. Further, there is nothing in sections 33, 92 or 105 to indicate that it is the intention of the legislature to require prior sanction of the Official Assignee before a bankrupt can seek relief under those provisions. Under section 33(1), a bankrupt may at any time after being adjudged bankrupt apply to the court for an order of discharge, and there is no legal requirement that for this purpose he should first obtain the sanction of anyone. This is also the case where an application is made to the court under sections 92(1) and 105(1) of the Act. It is true that section 24(4) provides that when a debtor is adjudged bankrupt his property shall become divisible amongst his creditors and shall vest in the Official Assignee. The word "property" is defined by section 2 to include "money, goods, things in action, land and every description of property, whether real or personal, obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as above defined". As such, only property as defined above would vest in the Official Assignee at the time of adjudication, and from the definition, unless something can be turned into an asset for payment of debts to the creditors it cannot be described as property within the meaning of section 2. The present application being not things in action or chose in action cannot be described as something which can be turned into asset for the estate of the bankrupt. The expression "chose in action" or "things in action" in the literal sense has been described to mean a thing recoverable by action as contrasted with a chose in possession, namely, a thing of which a person has not only ownership but also actual physical possession. The meaning of the expression has varied from time to time, but it is now used to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession. It is used in respect of both corporeal and incorporeal personal property which is not in possession. (See *Words and Phrases Legally Defined* Volume I). Under the circumstances, the case of *K. Ismail Ganey Rowther* referred to above is no authority for the proposition that an undischarged bankrupt in Malaysia is disabled from making the present application without the previous sanction of the Official Assignee. In that case, where the court had considered section 33(i)(a) of the Bankruptcy Enactment 1912, which is the forerunner of our present section 38(1)(a), Thorne Ag. C.J. rightly did not accept the proposition that the words "without the previous sanction of the Official Assignee" mean that if the bankrupt received the sanction of the Official Assignee he could maintain an action in respect of any property of any kind whatsoever which was in his order and disposition at the time of the bankruptcy. In his view, the legislature did not intend, and the section did not mean that by his sanction the Official Assignee can divest himself of the property either real or personal, which is vested in him by the receiving order or under an order of adjudication, and revest that property in the bankrupt for the purpose of bringing an action. It is therefore clear that the legal proposition as expounded by Thorne Ag. C.J. is only confined to the property of a bankrupt which is vested in the Official Assignee. In my view, since the present application does not come within the meaning of "property" as defined by section 2, it does not vest in the Official Assignee, and as such it is not necessary for the bankrupt to obtain the prior sanction of the Official Assignee. I am fortified in this conclusion by *Halsbury*, Volume 3, Fourth Edition, at paragraphs 556 and 558. Paragraph 556 provides that the rights of claims which the trustee may enforce by action, or in respect of which he may be liable as representing the estate, fall into two classes, namely (1) actions which at the commencement of the bankruptcy are pending by or against the bankrupt, and (2) rights of action which are vested in the bankrupt at the commencement of the bankruptcy, or which devolve on the bankrupt before he obtains his discharge. In the present case, we are only concerned with the latter class, and at paragraph 558 *Halsbury* has this to say:

"The rights falling under the second class may be enforced by action by the trustee, unless the cause of action is one which from its nature does not vest in the trustee, or to the benefit of which the estate is not entitled, such as rights of action in respect of personal damage or injury. . . ."

Accordingly, just as right of action in respect of personal damage and injury (which is excluded under section 38(1)(a) from prior sanction) is a cause of action to the benefit of which the estate is not entitled, the application in the present case is one which from its nature does not vest in the Official Assignee. Under the circumstances, I hold that section 38(1)(a) does not apply to an application under sections 92(1) and 105(1) of the Bankruptcy Act, where a bankrupt is seeking the court's discretion to review, rescind or vary

any order made by it, and as such no previous sanction of the Official Assignee is necessary in the present case.

On the question of whether a bankrupt can employ a solicitor without permission, Mr. Das is also relying on the same provisions as stated earlier on in this judgment. In particular, he relies on section 61(c) of the Bankruptcy Act which provides:

"The Official Assignee, subject to any general or special orders of the court, may employ, with the permission in writing of the Attorney-General, a solicitor to take any proceedings or do any business."

My attention is also drawn to section 152 of the English Bankruptcy Act 1914 which is designed to ensure that solicitors are not totally deprived of the right of audience before the Bankruptcy Court. This section reads as follows:

"Nothing in this Act shall take away or affect any right of audience that any person may have had at the commencement of this Act."

It is said that decided cases in England have attempted to restrict the scope of section 152, such as *Exparte Reynolds*[2] and *Re Elderton Exparte Russel.*[3] It is argued that there is no corresponding section 152 in our Bankruptcy Act and therefore the right of audience reserved for English solicitors is not available in this country. According to Mr. Das, the position here is entirely governed by section 17(5) and section 61(c) of the Bankruptcy Act, and according to his interpretation, in all cases only the Official Assignee can employ a solicitor on behalf of an undischarged bankrupt upon authorisation for the same from the Attorney-General. In my view, there is nothing in our Bankruptcy Act to suggest that, under no circumstances, a bankrupt can on his own employ a solicitor. This is particularly true where, as in the present case, a solicitor is employed in a matter where the cause of action does not vest in the Official Assignee. Even the provision of section 61(c) appears to prohibit only the Official Assignee from employing a solicitor without the written permission of the Attorney-General. As regards the other section, *i.e.* section 17(5), which is relied upon by Mr. Das, it is in the following terms:

"The Official Assignee shall take part in the examination of the debtor, and for the purpose thereof may, if specially authorized by the Attorney-General, employ an advocate and solicitor but no advocate and solicitor shall be allowed to take part in the examination on behalf of the debtor."

From the above provision, it can be inferred that as far as the employment of an advocate and solicitor is concerned only the power of the Official Assignee is restricted but not that of the bankrupt. Further, from the provisions of section 109(1)(m), a bankrupt can in fact enter into a contract provided he discloses the fact of his bankruptcy. If it is the intention of the legislature to curtail the right of a bankrupt to engage an advocate and solicitor in all cases, it would expressly say so in section 17. In the absence of such express prohibition in the Act, I rule that an undischarged bankrupt in this country is entitled to engage an advocate and solicitor to represent him in any action where the provision of section 38(1)(a) does not apply, or where the cause of action does not vest in the Official Assignee.

For the above reasons, I overrule the preliminary objection of the Official Assignee. Accordingly, I order that the bankrupt's application be heard on a date to be fixed by the Senior Assistant Registrar after the period of appeal has lapsed.

Objection overruled.

Solicitors: *V. Manuel & Co.; Ng Ek Teong & Partners.*

VASUDEVAN v. DAMODARAN

[O.C.J. (Syed Agil Barakbah J.) April 27, 1974]
[Alor Star — Civil Suit No. 256 of 1973]

Land Law — Lis pendens — Registration of — Power of High Court — Courts of Judicature Act, 1964 — National Land Code — R.S.C., 1957, O.50 r.1 and O.72 r.2.

Practice and Procedure — Lis pendens — Registration of against property — R.S.C. 1957, O.50 r.1 and O.72 r.2.

This was an application that the order for the registration of a *lis pendens* in respect of certain property be set aside. The application for registration of a *lis pendens* was made subsequent to an order of court setting aside a caveat filed by the respondent-plaintiff reported in *Damodaran* v. *Vasudeva* [1974] 1 M.L.J. 128.

Although the procedure for registration of a *lis pendens* is not embodied in any written law, in view of Order 72 rule 2 of the Rules of the Supreme Court, there is no necessity for any such written law so long as the High Court has the jurisdiction and power to order such registration.

The National Land Code does not either expressly or by implication forbid and limit the power of the High Court to make orders for the purpose of the preservation of property by means other than a caveat.

[**Editorial Note:** The same point was considered by the Court of Appeal in Singapore. See *Singapore Pak Hock Pai Athletic Association* v. *Yiu Pek Heng* [1973] 2 M.L.J. 6.]

Cases referred to:-

(1) *K.I. Muhiudeen Rawther* v. *K.E.P. Abdul Kassim & Ors.* [1959] M.L.J. 257 at p. 258.

(2) *Waimiha Saw Milling Co.* v. *Waione Timber Co.* [1923] 42 N.Z.L.R. 1137.

CIVIL SUIT.

The applicant/defendant made an application by Summons-in-Chambers that the order of the registration of a *lis pendens* made by the High Court on December 20, 1973, in favour of the respondent/plaintiff be set aside and that the costs of the application be taxed and paid by the respondent/plaintiff to the applicant/defendant in any event. The property in dispute comprised of certain lands in the Mukim of Sungei Pasir, District of Kuala Muda, Kedah.

Earlier, the application for the registration of a *lis pendens* was made subsequent to the order of the court setting aside the caveat dated October 3, 1973, filed by the respondent/plaintiff as reported in *Damodaran* v. *Vasudeva*, [1974] 1 M.L.J. 128. (Alor Star Originating Motion No. 38 of 1973). The facts of the dispute between the two parties are sufficiently stated therein.

Peter Mooney for the applicant.

T. R. Hepworth for the respondent.

Syed Agil Barakbah J.: The power of the High Court to order registration of a *lis pendens* is provided